SUPREME COURT, U. S.

NO. 1271

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

SUNDACO, INC., ET AL.,

Appellants

v.

THE STATE OF TEXAS,

Appellee

On Appeal From The Court of Civil Appeals
For The
Eleventh Supreme Judicial District of Texas

MOTION TO DISMISS OR AFFIRM

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

MONROE CLAYTON
Assistant Attorney General

Attorneys for Appellee

Box "R" Capitol Station
Austin, Texas 78711

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MOTION TO DISMISS OR AFFIRM

Appellee, The State of Texas, respectfully moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Court of Civil Appeals on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to require further argument.

I.

STATEMENT

The constitutional questions presented in Appellants' Jurisdictional Statement herein are identical to those which are fully discussed in Appellee's Motion

to Dismiss or Affirm in *Spartan's Industries, Inc. v. Texas*, No. 1255, of this Term, which also present no substantial federal question for review by this Court.

II.

THE NATURE OF THE CASE

A.

The State Statute Involved

This appeal raises the question of the constitutionality of Article 286a, Texas Penal Code, 1925, as amended, Acts 1961, 57th Leg., 1st Called Session, Ch. 15, p. 38) which prohibits the sale of 46 specified commodities on both the consecutive days of Saturday and Sunday, upon penalty of a fine up to $100, for the first offense, and a fine up to $500 for second and subsequent offenses, or imprisonment in jail up to 6 months, or both, and which provides that violations may be restrained by injunction.

B.

The Questions Presented

The Appellants, contend that this statute bears no reasonable relation to the public welfare; that they are denied equal protection because the statute raises the penalty and threatens an injunction only against those who are in the business of selling the particularly enumerated articles; and that these commodities are set forth in terms so vague and indefinite as to render the statute constitutionally infirm.

C.

The Proceedings Below

Appellee brought this suit to enjoin the Appellants from selling certain items of merchandise on both the two consecutive days of Saturday and Sunday in violation of Article 286a. Among other defenses, the Appellants attacked the constitutionality of this statute. The trial court, granted summary judgment for the Appellants on the ground that Article 286a was unconstitutionally vague and indefinite. Appeal was taken to the Court of Civil Appeals which reversed the trial court and upheld the constitutionality of the statute. It specifically held that the statute was not void for vagueness and remanded the cause to the trial court. Appellants then filed their application for writ of error to the Supreme Court of Texas which was refused with the notation "no reversible error."

III.

ARGUMENT

The Case Presents No Substantial Question Not Previously Decided By This Court

This Court, on May 29, 1961, carefully considered and comprehensively analyzed and decided the constitutionality of various state Sunday laws in *McGowan v. Maryland*, 366 U.S. 420, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582; and *Braunfeld v. Brown*, 366 U.S. 599.

Following the legal principles applicable to determining the constitutionality of Sunday laws as estab-

lished, or reaffirmed, in those cases, the Texas Legislature (on August 11, 1961) enacted Article 286a.

Article 286a was superimposed upon existing Article 286, Texas Penal Code, which is a general Sunday closing law, prohibiting sales, or business openings, punishable by a fine from $20 to $50 (subject to exceptions for drug stores, hotels, restaurants, sales of motor fuels, etc., as specified in Article 287) and which does not provide for injunctive relief, (similar to the situation presented to this Court in *Two Guys from Harrison, supra*).

In the above-cited cases it has been well established by this Court that a one-day surcease from commerce serves the general welfare of the public and is a proper exercise of the states' police power. It is further settled by these cases that it was within the power of the state to have concluded that businesses who were selling the enumerated items were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy to facilitate enforcement.

Purpose of the Statute

The purpose of the statute is to promote the health, recreation and welfare of the people of the State of Texas (Article 286a, Section 1) by preventing the sale of certain articles seven (7) consecutive days.

Section 6 of the Session Laws is omitted from the codification of Article 286a, however, this section (the emergency clause) further clarifies the purpose of the statute and reads, in part, as follows:

> "Sec. 6. The fact that there are not now adequate laws to prevent the selling of certain articles seven (7) consecutive days and the further fact that legislation is needed to prevent and punish such offense. . . ."

(Acts 1961, 57th Texas Leg., 1st Called Session, Ch. 15, p. 38).

Although a one-day surcease from labor has never been unanimous (because exceptions are always allowed), the Sunday closing laws have been vigorously attacked by those who take a day of rest on some day of the week other than Sunday (as in the cases cited above).

As stated by this Court in *McGowan v. Maryland*:

> "If is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual would suffice." (366 U.S. 450).

Article 286a serves this public purpose by providing a one-day surcease from labor (to occur on the weekend) and still alleviates the objections of the Sabbatarians by permitting sales of the specified commodities on either Saturday or Sunday (but not on both days) at the option of the merchant.

Equal Protection — Classification

Appellants contend they are denied equal protection of the laws because they are subjected to higher fines and injunctions only because they are in the business of selling the 46 enumerated commodities.

In answer to the same argument presented in *Two Guys From Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 591, 592 (1961), this Court held that it was within the power of the state legislature to have concluded that these businesses (who were selling the enumerated items) were particularly disrupting and that their violation of the law was of a different dimension, requiring a different remedy, citing *Williamson v. Lee Optical*, 348 U.S. 483, 489, as follows:

> "Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . a remedy there, neglecting the other."

This Court also stated in *McGowan v. Maryland*, 366 U.S. 425, 426 (1961):

> "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some equality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

The Texas statute operates in the same manner as those of Maryland and Pennsylvania, in these regards, and does not, therefore, present a substantial question for review by this Court.

Vagueness

Appellants also contend that the prohibited commodities are set forth in terms so vague and indefinite as to render that statute unconstitutional.

The commodities enumerated in Article 286a are strikingly similar to those presented to this Court in *Two Guys From Harrison-Allentown, Inc. v. McGinley, supra*, and also reviewed by this Court in *Arlan's Department Store of Louisville, Inc. v. Kentucky*, 369 S.W.2d 9 (Ky.Appls., 1963); dismissed for want of a substantial federal question, 376 U.S. 186 (1964).

A South Carolina statute (Sec. 64-2.2, Code 1962) contains a list of commodities almost identical with those set forth in the Texas statute. The Supreme Court of South Carolina, in *State v. Solomon*, 245 S.C. 550, 141 S.E.2d 818 (1965), held that statute not to be unconstitutionally vague. The appeal to this Court was dismissed for want of a substantial federal question. *Solomon v. South Carolina*, 382 U.S. 204 (1965).

A similar question of vagueness was rejected in *Whitney Stores, Inc. v. Summerford*, 280 F.Supp. 406 (1968). That judgment was affirmed by this Court, 393 U.S. 9 (1968).

In *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407, 413 (1969), the Supreme Court of Texas found that:

> "[V]irtually all of these terms are common words, which will be understood by any merchant. If a marginal or questionable case could be posed for the application of the word 'hardware,' for example, this would be no ground for vitiating an entire legislative enactment. United States v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947); Jordan v. De George, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1951)."

Since no facts or evidence were presented in this case, the statute is not constitutionally infirm on its face, and there is no substantial question of vagueness presented to this Court for review.

IV.

CONCLUSION AND PRAYER

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsub-

stantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the Court of Civil Appeals.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
First Assistant Attorney General

ALFRED WALKER
Executive Assistant

ROBERT C. FLOWERS
Assistant Attorney General

MONROE CLAYTON
Assistant Attorney General

Attorneys for Appellee

Box "R" Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I hereby certify that copies of Appellee's Motion to Dismiss or Affirm were served on the attorneys for the Appellants by depositing same in the United States Mail, postage prepaid, certified mail, on this the _____ day of _____, 1970, addressed as follows: William H. Allen, Esquire, 888 Sixteenth Street, N.W., Washington, D. C. 20006, and Messrs. Harold B. Berman and Jay S. Fichtner, 1510 LTV Tower, 1525 Elm Street, Dallas, Texas 75201

Robert C. Flowers
Assistant Attorney General of Texas